Supreme Court, U.S.
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92-446

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, and VERNIE RHODES, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether employees who accept payment of substantial consideration in exchange for an agreement to release their employer from suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, must unconditionally tender back that consideration prior to commencing an ADEA suit against the employer.

PARTIES TO THE PROCEEDING AND RULE 29.1 LIST

All parties to the proceeding below are reflected in the case caption. Petitioner Sears, Roebuck and Co. has no parent companies or nonwholly-owned subsidiaries to list pursuant to Rule 29.1.

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VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, and VERNIE RHODES, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Sears, Roebuck and Co. ("Sears")[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on April 20, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 958 F.2d 1036. App. A, pp. A3-A16. The District Court's order denying Sears' motion for summary judgment was entered on February 7, 1991. App. B, pp. A17-A18. Subsequently, on April 26, 1991, the District Court entered an order denying Sears' motion for reconsideration. App. C, pp. A19-A20.

JURISDICTION

The judgment of the Court of Appeals was entered on April 20, 1992. App. A, p. A1. A timely petition for rehearing and suggestion of

[1] Sears was incorrectly denominated as "Sears, Roebuck & Company" in the court orders and opinions below. The attached appendix materials have been modified to avoid potential confusion and reflect the correct corporate name set forth in this petition.

rehearing *en banc* was denied on June 22, 1992. App. F, pp. A31-A32. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant provisions of the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA"), are set forth in the Appendix. App. G, pp. A33-A35.

STATEMENT OF THE CASE

In 1987, Sears commenced a national restructuring of its entire distribution network to reduce delivery costs and recapture its former share of the retail market. As part of this restructuring, in 1989 the Sears Retail Distribution Center ("RDC") in Birmingham, Alabama, where Respondents were employed, was designated for conversion to a Home Delivery Center ("HDC"). App. D, p. A22. In late October 1989, Sears informed Respondents of this plan to restructure the Birmingham facility. The Respondents were informed that the new HDC would require a substantially reduced workforce. In lieu of potential termination resulting from that reduction in force, Sears offered Respondents the option of receiving a voluntary severance incentive package which included severance pay, early retirement (where applicable) and extended medical and life insurance benefits. To receive this package, however, the employees had to execute a General Release and Waiver. App. A, p. A6; App. D, pp. A22-A23.

In early November 1989, Respondents voluntarily accepted the severance package. They resigned from Sears and released it from all "damages," "actions, causes of action . . . [and] claims of damage," specifically including ADEA actions. Respondents received benefits which ranged from just under $10,000 to nearly $16,000 for the most senior employee. Approximately six weeks later, in mid-December 1989, Sears' corporate headquarters revised its original plan for the Birmingham facility. It decided to restructure that operation into a combined HDC and Cross-Dock Center. This configuration required a somewhat greater workforce than had been originally planned for the new HDC alone, but still smaller than the workforce at the RDC. Sears' headquarters informed Birmingham management of the decision on January 2, 1990. A formal announcement of the revised plan

was made to the remaining RDC employees on January 16. Shortly thereafter, several of the Respondents requested reinstatement but were informed that no openings were then available. Later, however, when it became apparent that another shipper was needed, Sears offered one of the Respondents full-time reinstatement to his former position, but he declined the offer. All of the Respondents were eventually offered part-time positions. Only one accepted. App. D, pp. A23-A24.

Respondents filed age discrimination charges with the Equal Employment Opportunity Commission ("EEOC") in February 1990. This suit thereafter followed alleging ADEA violations, breach of contract and state law fraud.[2] App. A, p. A7. The suit acknowledges that Respondents received severance benefits in exchange for their releases. It asserts that the releases were defective, however, because they were allegedly based upon misrepresentations as to what would be the fate of the Birmingham facility. Respondents have never returned or unconditionally offered to return the severance benefits they received. As a result, Sears sought summary judgment in the District Court asserting that Respondents had ratified the releases by their continued retention of the severance benefits. The District Court, relying upon Alabama law, denied Sears' motion. Sears subsequently moved for reconsideration of that ruling following the intervening decision of the Fifth Circuit in *Grillet v. Sears, Roebuck & Company*, 927 F.2d 217 (5th Cir. 1991). *Grillet*, a case which involved the identical ratification issue, had resolved that issue in Sears' favor. The District Court nevertheless summarily denied Sears' motion to

[2] The District Court granted Sears' motion for partial summary judgment with respect to Respondents' state law claims. App. D, pp. A21-A28. Respondents appealed that ruling. That appeal was consolidated with Sears' appeal of the ratification issue for hearing before the Eleventh Circuit. The Court of Appeals affirmed in part and reversed in part the District Court's grant of partial summary judgment on the state law claims. App. A, pp. A12-A14. That portion of the decision below is not the subject of this petition.

reconsider. Sears then perfected its appeal to the Eleventh Circuit.[3] App. A, p. A7.

The Court of Appeals agreed with Sears that federal law controls the disposition of the ratification issue. The court concluded, however, that "ADEA plaintiffs are not required to tender the consideration received for releases as a condition prerequisite to challenging those releases in court . . . " App. A, p. A12. The court expressly acknowledged that "[t]wo other circuits have examined the ratification question presented here . . . ," App. A, p. A11, citing *Grillet* and the Fourth Circuit's decision in *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, U.S. , 112 S.Ct. 177, 116 L.Ed.2d 139 (1991). The Eleventh Circuit nevertheless rejected the holdings of those Circuits. Relying upon *Hogue v. Southern Railway Co.*, 390 U.S. 516 (1968), a per curiam decision of this Court under the Federal Employer's Liability Act ("FELA") that had not been mentioned in either *Grillet* or *O'Shea*, the Eleventh Circuit concluded that "a tender requirement would deter meritorious challenges to releases . . . " App. A, p. A11. Based upon the foregoing, the Court of Appeals affirmed the District Court's denial of Sears' motion for summary judgment. Sears' petition for rehearing and suggestion of rehearing en banc was likewise denied. App. F, pp. A31-A32.

REASONS FOR GRANTING THE WRIT

Review by this Court of the decision below is warranted. *First*, as the Eleventh Circuit recognized, its decision conflicts with recent opinions of the Fourth and Fifth Circuits. It also conflicts, in principle, with recent decisions by the Second and Sixth Circuits. *See Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, U.S. , 111

[3] The Court of Appeals accepted jurisdiction over Sears' appeal of the ratification question pursuant to the collateral order doctrine. It found, in accordance with *Grillet* and the Second Circuit's decision in *Janneh v. GAF Corp.*, 887 F.2d 432, 434-35 (2d Cir. 1989), *cert. denied*, U.S. , 111 S.Ct. 177, 112 L.Ed.2d 141 (1990), "that the collateral order doctrine should be applied to review an interlocutory order which denies enforcement of an agreement to forego litigation." App. A, p. A9. The Eleventh Circuit then concluded that Sears had met the conditions established by this Court for application of the collateral order doctrine. App. A, p. A9. *See Richardson-Merrill, Inc. v. Koller*, 472 U.S. 424, 431 (1985).

S.Ct. 177, 112 L.Ed. 2d 141 (1990) and *Cumberland & Ohio Co. of Texas v. First American National Bank*, 936 F.2d 846 (6th Cir. 1991), *cert. denied*, U.S. , 112 S.Ct. 878, 116 L.Ed. 2d 783 (1992). *Second*, the question presented—whether, as a precondition to suit, employees who seek to disavow ADEA releases are required to return the benefits they received in exchange for such releases—is a recurrent question of national importance, particularly in this age of substantial corporate restructuring. This case also raises significant issues under the ADEA concerning the proper balance to be struck between the protection of older employees from employer overreaching and the Congressional intent to encourage the voluntary resolution of employment discrimination disputes. *Finally*, this controversy presents the Court with the critical need to clarify the precedential reach of its decision in *Hogue*, erroneously and expansively interpreted by the court below as controlling in the context of ADEA settlements.

A. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals On The Same Question

Grillet addressed the issue presented here under virtually identical circumstances. Grillet, like Respondents, was a Sears employee who accepted a severance package in exchange for an agreement to release Sears from suit. 927 F.2d at 218. Grillet, like Respondents, then sued Sears alleging that the release had been signed in reliance upon Sears' purported misrepresentations. Grillet, like Respondents, never unconditionally offered to return the severance benefits she had received. *Id.* at 218-19. The Fifth Circuit, however, unlike the court below, reversed the trial court's denial of Sears' motion for summary judgment. The Fifth Circuit reasoned that "[a] party cannot be permitted to retain the benefits received under a contract and at the same time escape the obligations imposed by the contract." *Id.* at 220. As the court observed, the "party seeking rescission must attempt to restore the *status quo ante* . . . " *Id.* Similarly, in *O'Shea*, the Fourth Circuit reached the same conclusion in another ADEA case, citing the "well-established proposition that the retention of the benefits of a voidable contract may constitute ratification." 930 F.2d at 362. Put more bluntly, in language equally applicable here, O'Shea had "sought to have it both ways, and that is something which the doctrine of ratification was designed not to permit." *Id.* at 363. *See also Janneh v. GAF Corporation*, *supra* (employment discrimination case affirming

employer's "bargained-for right to avoid trial" by settlement agreement and release) and *Cumberland & Ohio Co. of Texas v. First American National Bank*, *supra* (commercial case citing *Grillet*, with approval, for proposition that "releasor who retains the consideration after learning that the agreement is voidable has effectively ratified the release").

The decision below cannot be reconciled with *Grillet* or *O'Shea*. This Court should resolve the conflict in the Circuits. Resolution of that conflict is important to employers and employees alike. Clarification from this Court would be especially beneficial to national employers, such as Sears, who are restructuring their operations and offering nationwide incentive severance inducements. The effectiveness of those inducements in achieving their desired objective, "the right to avoid the uncertainties and irritations of a trial and appeal" (*Grillet*, 927 F.2d at 220; *Janneh*, 887 F.2d at 435), should not vary from Circuit to Circuit.

B. The Decision Below Raises An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The decision below also raises the important and recurrent question of whether a tender back requirement supports or denigrates the ADEA's avowed purpose of helping "employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b).[4] As this Court has observed in the analogous context of Title VII, "Congress expressed a strong preference for encouraging voluntary settlement of employment claims." *Carson v. American Brands, Inc.*, 450 U.S. 79, 89 (1981). Indeed, "[c]ooperation and voluntary compliance were selected [by Congress] as the preferred means" to achieve the goal of equal employment opportunity. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). In *Gilmer v.*

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[4] The recurrent nature of this question is reflected in the spate of recent district court decisions either adhering to or rejecting the holdings in *Grillet* and *O'Shea*. A number of cases have followed *Grillet* and *O'Shea* in upholding the tender back requirement. *Ponzoni v. Kraft General Foods, Inc.*, 774 F. Supp. 299, 316 (D. N.J. 1991); *Alphonse v. Northern Telecom, Inc.*, 776 F. Supp. 1075, 1079 (E.D. N.C. 1991) and *Haslach v. Security Pacific Bank Oregon*, 779 F. Supp. 489, 492 (D. Ore. 1991). Other cases have rejected *Grillet* and the tender back requirement. *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359, 1365 (C.D. Ill. 1991) and *Sperry v. Post Publishing Company*, 773 F. Supp. 1557, 1558 (D. Conn. 1991).

Interstate/Johnson Lane Corp., U.S. , 111 S.Ct. 1647, 1654, 114 L.Ed. 2d 26, 39 (1991), this Court recently reaffirmed that "out of court dispute resolution . . . is consistent with the statutory scheme established by Congress" for ADEA claims as well. The enactment in 1990 of the Older Worker's Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f), which establishes a detailed framework for the voluntary release of ADEA claims, underscores the importance of voluntary settlements in the ADEA enforcement scheme.

The court below, however, concluded that a tender back requirement would deter "meritorious challenges to releases in [ADEA] lawsuits." App. A, p. A11. Such a rule, the lower court declared, "would . . . encourage egregious behavior on the part of employers in forcing certain employees into early retirement for the economic benefit of the company. The ADEA was specifically designed to prevent such conduct . . . " App. A, p. A11. These conflicting views of the policies underlying the ADEA warrant resolution by this Court. If a tender back requirement violates the policies of the ADEA and OWBPA, this Court should make that proposition clear. Employers would then be aware that the releases they bargained for are of limited utility; indeed, an employee can utilize the severance benefits obtained in exchange for a release to finance an ADEA suit against his employer with little prospect of the employer later recovering such benefits, even if the company is vindicated at trial. Conversely, if a tender back requirement fosters the voluntary settlement of ADEA claims, the decision below must be reversed. There are, as this Court has stated, "serious" consequences where parties are denied "the opportunity to compromise" a discrimination claim, particularly a compromise "to avoid the costs and uncertainties of litigation." *Carson v. American Brands*, 450 U.S. 79, 87, 89 (1981).

The ramifications of this ADEA policy conflict are of national importance. Employers across the country are now streamlining their operations and reducing their workforces in order to effectively compete in a global economy. Severance incentive programs are a crucial component of such workforce reductions. They avoid the necessity for involuntary terminations and, when combined with releases, minimize the tremendous toll in time and resources caused by litigation. The salutary purposes of severance incentive programs are seriously undermined by the decision below. If a release obtained in return for a severance package offers no assurance to the employer that it will

avoid trial or at least not finance the litigation against itself there is surely little reason for the employer to pay enhanced benefits to the departing employee—an unhappy outcome for the employer, the employee and the judicial system. As Judge Kaufman noted in *Janneh*, an employer's bargained-for right to avoid trial by enforcing the settlement agreement . . .

> implicates our nation's strong judicial and public policies favoring out-of-court settlement. Litigants, courts, and Congress view settlement as a positive force, indispensable to judicial administration. Foregoing formal courtroom procedures, including discovery, trial, briefs and arguments, brings substantial benefits to the parties. The costs of litigation are reduced and crowded dockets are relieved.

887 F.2d at 435 (footnote omitted).

C. The Court Below Misconstrued A Decision Of This Court.

The court below concluded that this Court's reasoning in *Hogue* was dispositive of the ratification question because "[b]oth [ADEA and FELA] are remedial statutes designed to protect employees." App. A, p. A11. That conclusion is specious. The FELA, in stark contrast to the ADEA, is hostile toward private resolution of injury claims. *See* 45 U.S.C. § 55 ("[a]ny contract . . . the purpose of which shall be to enable any common carrier to exempt itself from liability created by this chapter, shall to that extent be void . . . ") Moreover, this Court has recognized that the FELA reflects a special, indeed unique, solicitude for railroad workers and the particular hazards they face. *See Kernan v. American Dredging Co.*, 355 U.S. 426, 431-32 (1958). In ADEA cases, as previously noted, the private resolution of disputes is an integral component of the statutory scheme. ADEA litigants are, by definition, older and more experienced employees who are likely to have greater than average financial resources and business sophistication. Also, unlike FELA claimants, who typically seek recovery for bodily injuries, ADEA claimants generally are aware of the nature and extent of their injuries at the time of settlement. The policy concerns underlying *Hogue*, a personal injury case, are simply inapplicable in the far different context of an employment discrimination lawsuit. The Court of Appeals' reliance upon the tired shibboleth that both statutes are "remedial" is no substitute for the careful consideration of these differences.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

Dated: September 11, 1992

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APPENDICES A-G

APPENDIX A

United States Court of Appeals

Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

April 20, 1992

Miguel J. Cortez
Clerk

In Replying Give Number Of Case And Names Of Parties

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Nos. 91-7358 & 91-7479 FORBUS et al. v. SEARS, ROEBUCK AND CO.

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to Rule 36 of the Federal Rules of Appellate Procedure. Fed.R.App.P. 39, 40 and 41, and the corresponding circuit rules govern costs, petitions for rehearing and mandate, respectively.

To be timely, a petition for rehearing or a suggestion of en banc consideration must be received in the clerk's office within twenty-one (21) days of the date of this opinion and judgment. No additional time for service by mail is permitted. *See* 11th Cir. R. 40-2.

Pursuant to *Davidson v. City of Avon Park*, 648 F.2d 172 (11th Cir., 1988), if attorney's fees on appeal are authorized by law they must be sought by filing a petition for attorney's fees with this office within fourteen (14) days of the date of the court's opinion. Any request for attorney's fees received after that date must be accompanied by a motion to file out of time.

In a direct criminal appeal, 11th Cir. R. 41-1 provides that issuance of the mandate shall not be stayed simply upon request: "Ordinarily the motion will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay."

Counsel appointed under the Criminal Justice Act are reminded that 11th Cir. R. Addendum Four, section (f)(4), provides: "In the event of affirmance or other decision adverse to the party represented appointed counsel shall promptly advise the party in writing of the right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court. Counsel shall file such petition if requested to do so by the party in writing."

Sincerely,

MIGUEL J. CORTEZ, Clerk

By: _____
Deputy Clerk

Encl.
c: William A. Robinson, William F. Gardner
S. Richard Pincus, Steven L. Gillman
William C. Knight, Jr., J. Patrick Logan

Note: No. 91-7358 costs are taxed against appellant.
No. 91-7479 costs are taxed equally.

Vernal FORBUS, Earl J. Beacham, Rudolph Caddell, Frank R. Davis, Vernie Rhodes, Jr., Plaintiffs-Appellees,

v.

SEARS, ROEBUCK AND CO.
Defendant-Appellant.

Vernal FORBUS, Earl J. Beacham, Rudolph Caddell, Frank R. Davis, Vernie Rhodes, Jr., Plaintiffs-Appellants,

v.

SEARS, ROEBUCK AND CO.
Defendant-Appellee.

Nos. 91-7358, 91-7479.

United States Court of Appeals,
Eleventh Circuit.

April 20, 1992.

Retirees brought suit under the Age Discrimination in Employment Act (ADEA) against former employer, alleging that they accepted voluntary severance packages and executed releases under duress, and that misrepresentations were made to them by employer in connection with their retirement. Retirees also asserted state law claims, including breach of contract and fraud. Employer moved for summary judgment, asserting that retirees ratified releases by retaining benefits. The United States District Court for the Northern District of Alabama, No. CV-90-G-01299-S, J. Foy Guin, Jr., J., denied motion, and employer's subsequent motion to reconsider order denying summary judgment. Partial summary judgment was granted to employer on state law claims. Employer and retirees appealed. After consolidation of appeals, the Court of Appeals, Dubina, Circuit Judge, held that: (1) order denying employer's motion for reconsideration of denial of summary judgment was appealable under collateral order doctrine; (2) retirees were not required to tender retirement benefits back to employer as prerequisite to maintenance of suit, and their retention of severance benefits during pendency of suit did not constitute ratification of releases; and (3) retirees could assert fraud

claims under Alabama law, notwithstanding their former status as at-will employees.

District court's order in case No. 91-7358 affirmed; order in case No. 91-7479 affirmed in part and reversed in part.

Cox, Circuit Judge, filed dissenting opinion.

1. Federal Courts 572

Collateral order doctrine is applicable to render interlocutory order appealable if order being reviewed satisfies three conditions: it must conclusively determine disputed question; it must resolve important issue completely separate from merits of action; and order must be effectively unreviewable on appeal from final judgment. 28 U.S.C.A. § 1291.

2. Federal Courts 574

Collateral order doctrine should be applied to review an interlocutory order which denies enforcement of an agreement to forego litigation.

3. Federal Courts 579

Interlocutory order denying employer's motion for reconsideration of denial of summary judgment on issue whether retirees waived suit against employer pursuant to releases executed upon retirement was appealable under collateral order doctrine, considering that denial of motion to reconsider was intended to be final word on whether employer could avoid litigation on basis of releases, that facts and issues involving ratification of releases were separate and distinct from facts and issues involving underlying age discrimination claims, and that employer's claim that it contracted for right to avoid being sued by retirees would be unreviewable on appeal from final judgment. 28 U.S.C.A. § 1291.

4. Release 24(2)

Retirees were not required to tender retirement benefits back to former employer before bringing suit under the Age Discrimination in Employment Act (ADEA) against former employer challenging validity of releases they executed as part of voluntary severance package, and retention of severance benefits during pendency of lawsuit did not

constitute ratification of releases. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.

5. Release 24(2)

Plaintiffs bringing suit under the Age Discrimination in Employment Act (ADEA) are not required to tender consideration received for releases as condition prerequisite to challenging those releases in court. Age Discrimination in Employment Act of 1967, § 2 et seq., as amended, 29 U.S.C.A. § 621 et seq.

6. Master and Servant 8(1)

Under Alabama law, at-will employment contracts can be terminated by either party with or without cause or justification.

7. Master and Servant 20

Under Alabama law, an at-will employee can be discharged for any reason, regardless of whether the employer's motive is reasonable, unreasonable, justified, unjustified, indifferent, malicious, or even illegal.

8. Torts 6

Alabama does not recognize independent tort action for bad faith breach of an employment contract.

9. Fraud 28

Under Alabama law, former at-will employees who made arrangement with employer prior to their termination in which employer agreed to provide enhanced severance benefits in return for agreement of employees to execute releases and waivers could bring claims against employer for misrepresentation, suppression of material facts, and fraudulent inducement to terminate their employment; employment at-will status that existed before supplemental contract did not preclude suit and was only relevant to explain why severance agreement was offered and accepted.

Cabaniss, Johnston, Gardner, Dumas & O'Neal, William A. Robinson & R. Taylor Abbott, Jr., Birmingham, Ala., S. Richard

Pincus, Fox & Grove, Joshua D. Holleb, Steven L. Gillman, Chicago, Ill., for defendant-appellant.

William C. Knight, Jr., Burr & Forman, J. Patrick Logan, Birmingham, Ala., for plaintiffs-appellees.

Appeals from the United States District Court for the Northern District of Alabama.

Before COX and DUBINA, Circuit Judges and GODBOLD, Senior Circuit Judge.

DUBINA, Circuit Judge:

In case No. 91-7358, Sears, Roebuck and Co. ("Sears") appeals the district court's order denying Sears' motion for reconsideration of the denial of summary judgment on the issue of whether Vernal Forbus, Earl J. Beacham, Rudolph Caddell, Frank R. Davis, and Vernie Rhodes, Jr. (collectively referred to as "the Retirees"), have waived suit against Sears pursuant to releases they executed upon retirement. In Case No. 91-7479, the Retirees appeal the district court's order granting summary judgment in favor of Sears on all of the Retirees' state law claims. For the reasons which follow, we affirm the district court's order in Case No. 91-7358, and affirm in part and reverse in part the district court's order granting summary judgment in Case No. 91-7479

I. FACTUAL BACKGROUND

The Retirees were employed by Sears at a Retail Distribution Center ("RDC") in Birmingham, Alabama. In the fall of 1989, the Retirees were informed that Sears planned to convert the RDC into a Home Delivery Center ("HDC"), which would substantially reduce the number of jobs available. A severance incentive package ("the package") was offered to encourage voluntary severance. Acceptance of the package required execution of a release and waiver which precluded the retiring employee from bringing any action against Sears as a result of termination from employment with Sears. Each Retiree accepted the package, retired early, and received the promised severance benefits, which were more substantial than the benefits would have been had the Retiree not elected the package.

Thereafter, Sears changed its restructuring plans advising the remaining employees that instead of an HDC the RDC would be converted to a Cross-Dock Center, which required a work force somewhere in-between that needed for an RDC or HDC. All Retirees except Beacham asked for their jobs back, but were informed that no jobs were available. The Retirees then filed charges of age discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that they accepted their packages and executed the releases under duress, and that misrepresentations were made to them by Sears. None of the Retirees has tendered his severance payments back to Sears. Instead, each has offered to offset any award received in his lawsuit by the amount of severance benefits accepted.

The Retirees' complaint alleges a claim under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., as amended ("ADEA"), and several state law claims, including breach of contract and fraud. Sears filed a motion for summary judgment based upon the Retirees' failure to unconditionally tender back the severance payments, arguing that even if questions of fact existed concerning the validity of the releases because of fraud and duress, the Retirees ratified the releases by retaining the benefits. The district court denied Sears' motion on the grounds that genuine issues of material fact existed and that the Retirees' offer to offset any award was sufficient tender. Sears filed a motion asking the district court to certify its order for interlocutory appeal; it was denied. Shortly thereafter, the Fifth Circuit issued its opinion in *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir.1991), which resolved in Sears' favor issues identical to those presented in this case. Sears filed a motion asking the district court to reconsider its order denying summary judgment in light of *Grillet;* it was denied. Sears then perfected its appeal to this court.

Sears also filed a motion for partial summary judgment as to each of the Retirees' state law claims.[1] The district court granted that motion in its entirety. The district court found that because the Retirees were at will employees, their breach of contract claims failed and they sustained no recoverable damages even if Sears were guilty of fraud. The district court also found that there was no evidence that

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[1] Sears' motion for summary judgment did not include the Retirees' ADEA claims, which remain pending before the district court and are not at issue in this appeal.

Sears manifested a present intent to deceive the Retirees at the time the package was presented to them, and that Alabama does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing in an at will employment contract. The district court certified its order granting summary judgment pursuant to Fed.R.Civ.P. 54(b), from which the Retirees perfected their appeal. The two appeals were then consolidated by this court.

II. SEARS' APPEAL

A. *Jurisdiction*

[1] Before discussing the merits of Sears' appeal, we must first determine whether the case is properly before us. Interlocutory orders are not appealable as a general rule. *See* 28 U.S.C. § 1291. Sears argues, however, that we have jurisdiction to hear its appeal pursuant to the collateral order doctrine, a judicially created exception to 28 U.S.C. § 1291. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The collateral order doctrine is applicable only if the order being reviewed satisfies the following three conditions: "It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'" *Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 431, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985) (quoting *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978)).

[2] The Fifth Circuit recently applied the collateral order doctrine to review an interlocutory order denying summary judgment which effectively denied enforcement of a release agreement. *See Grillett,* 927 F.2d at 219-20. The Second Circuit also applied the doctrine in a similar context when it determined that it had jurisdiction to review an order denying a defendant's motion to enforce a settlement agreement. *See Janneh v. GAF Corp.*, 887 F.2d 432, 434-35 (2d Cir.1989), *cert. denied,* ___ U.S. ___, 111 S.Ct. 177, 112 L.Ed.2d 141 (1990). The Supreme Court has held that the deprivation of a right not to go to trial is effectively unreviewable after final judgment and is immediately appealable. *See Lauro Lines S.R.L. v. Chasser,* 490 U.S. 495, 499-500, 109 S.Ct. 1976, 1978-79, 104 L.Ed.2d 548 (1989). In civil

cases, although the Court has not addressed the precise question presented here, it has determined that an immediate appeal may be taken from orders denying motions to dismiss based upon absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43, 102 S.Ct. 2690, 2697-98, 73 L.Ed.2d 349 (1982), or qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 525, 105 S.Ct. 2806, 2814-15, 86 L.Ed.2d 411 (1985), as well as orders denying motions to compel arbitration, *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11, 103 S.Ct. 927, 934, 74 L.Ed.2d 765 (1983).

We agree with the Fifth and Second Circuits that the collateral order doctrine should be applied to review an interlocutory order which denies enforcement of an agreement to forego litigation. We must now determine whether the order from which Sears appeals meets the requirements for review.

[3] To meet the first requirement, the order must have been entered as "the final word on the subject addressed." *Moses H. Cone Hosp.*, 460 U.S. at 12-13 n. 14, 103 S.Ct. at 935 n. 14. The district court's denial of Sears' motion to reconsider was intended to be the final word on whether Sears could avoid litigation on the basis of the releases, so the first requirement is satisfied.

To meet the second requirement, the facts and issues involving ratification of the releases must be separate and distinct from the facts and issues involving the Retirees' underlying ADEA claims. Since the issue of ratification is not related to the ADEA claims, the second requirement is satisfied.

The third requirement is also satisfied. The essence of Sears' claim regarding ratification is that it contracted for the right to avoid being sued by the Retirees.

After considering the foregoing, we are persuaded that the collateral order doctrine vests this court with jurisdiction to review the merits of Sears' appeal.

B. *Ratification*

[4] We now consider whether the Retirees have ratified the releases by retaining the benefits received thereunder. We review this issue de novo. *Akins v. Snow*, 922 F.2d 1558, 1560 (11th Cir.), *cert. denied*, ____ U.S. ____, 111 S.Ct. 2915, 115 L.Ed.2d 1079 (1991). The

district court's conclusions of law on summary judgment are subject to the same standard of appellate review as any question of law raised on appeal. *Morrison v. Washington County, Alabama,* 700 F.2d 678, 682 (11th Cir.), *cert. denied,* 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983), *modified on other grounds, Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc.,* 818 F.2d 1530 (11th Cir.1987).

Sears argues that even if the releases were tainted by misrepresentation or duress, the Retirees ratified them as a matter of law by accepting the benefits of the bargain. Sears insists that the Retirees cannot be allowed to retain the severance benefits at the same time they deny Sears the benefit of its bargain by maintaining this lawsuit. The Retirees contend that the tender back of their severance benefits is not an absolute requirement.

The district court based its determination that the Retirees' tender was sufficient under Alabama law. In that respect, the district court was in error. In *Hogue v. Southern Ry. Co.,* 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968), which involved a suit under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. ("FELA"), the Supreme Court held that "[t]he question whether a tender back of the consideration was a prerequisite to the bringing of the suit is to be determined by federal rather than state law." 390 U.S. at 517, 88 S.Ct., at 1151. Although *Hogue* involved FELA claims, we find *Hogue's* reasoning persuasive regarding the application of federal law to the ADEA claims presented in the instant case. *See also Eatmon v. Bristol Steel & Iron Works, Inc.,* 769 F.2d 1503, 1516-17 (11th Cir.1985) (federal common law governs the impact of agreements involving federal law claims).

The Supreme Court proceeded in *Hogue* to reject the tender requirement in FELA lawsuits. The Court held that tender of consideration was not only excused where fraud was involved in the execution of a release, but also was not required in the event of a mutual mistake. The Court also held that a rule which required a refund would be incongruous with the general policy of the FELA. One district court has relied on *Hogue* to reject tender requirements in an ADEA case. *See Isaacs v. Caterpillar, Inc.,* 765 F.Supp. 1359 (C.D.Ill. 1991). Other courts have applied *Hogue* to reject tender requirements in cases involving other federal remedial statutes. *See, e.g., Smith v.*

Pinell, 597 F.2d 994, 996 (5th Cir.1979) (Jones Act); *Wahsner v. American Motors Sales Corp.*, 597 F.Supp. 991, 998 (E.D.Pa.1984) (Automobile Dealers' Day in Court Act).

Two other circuits have examined the ratification question presented here and held that a releasor's retention of benefits, after learning that a release is voidable, constitutes a ratification of the release. *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358, 362-63 (4th Cir.), *cert. denied,* ____ U.S. ____, 112 S.Ct. 177, 116 L.Ed.2d 139 (1991); *Grillet,* 927 F.2d at 220.[2] In neither case, however, did the court consider the *Hogue* decision. We can find no basis for rejecting the Supreme Court's reasoning in *Hogue* and not applying it to ADEA claims as well as FELA claims. Both are remedial statutes designed to protect employees. We agree with, and find persuasive, the reasoning set forth in *Isaacs* that explains public policy considerations supporting our determination that the Retirees should not be required to tender their retirement benefits back to Sears as a prerequisite to the maintenance of their lawsuit. 765 F.Supp. at 1366-68.

The Court in *Hogue* found that a tender requirement would deter meritorious challenges to releases in FELA lawsuits. The same deterrence factor applies to ADEA claims. Forcing older employees to tender back their severance benefits in order to attempt to regain their jobs would have a crippling effect on the ability of such employees to challenge releases obtained by misrepresentation or duress. Such a rule would, in our opinion, encourage egregious behavior on the part of employers in forcing certain employees into early retirement for the economic benefit of the company. The ADEA was specifically designed to prevent such conduct, and we reject a tender requirement as a prerequisite to instituting a challenge to a release in an ADEA case. As the Supreme Court decided in *Hogue,* unless the release otherwise bars recovery, the benefits paid "shall be deducted from any award determined to be due to the injured employee." 390 U.S. at 518, 88 S.Ct. at 1152.

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[2] In *Cumberland & Ohio Co. of Texas, Inc. v. First American Nat'l Bank,* 936 F.2d 846, 850 (6th Cir.1991), the Sixth Circuit held that generally, a releasor who retains consideration after learning that a waiver and release is voidable effectively ratifies the release, citing *Grillet v. Sears, Roebuck & Co.,* 927 F.2d 217 (5th Cir. 1991). *Cumberland* was not an employment case, however, nor were ADEA claims a factor as they are in the case before us.

[5] We conclude that, as a matter of federal law, ADEA plaintiffs are not required to tender the consideration received for releases as a condition prerequisite to challenging those releases in court, and that the Retirees' retention of their severance benefits during the pendency of this lawsuit does not constitute ratification of those releases. We therefore affirm the district court's order denying Sears' motion for reconsideration of the denial of its motion for summary judgment.

III. THE RETIREES' APPEAL

In any appeal from an order granting summary judgment, this court's review is plenary, and we apply the same legal standards as those that controlled the district court in determining whether summary judgment is appropriate. *Hoffman v. Allied Corp.*, 912 F.2d 1379 (11th Cir.1990). We must also review a district court's interpretation of state law de novo. *Salve Regina College v. Russel*, ____ U.S. ____, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991).

[6-8] The Alabama courts have consistently adhered to the principle that at will employment contracts can be terminated by either party with or without cause or justification. *Hinrichs v. Tranquilaire Hosp.*, 352 So.2d 1130, 1131 (Ala.1977). An at will employee in Alabama can be discharged for any reason, regardless of whether the employer's motive is reasonable, unreasonable, justified, unjustified, indifferent, malicious, or even illegal. *Id.; Jones v. Ethridge*, 497 So.2d 1107 (Ala.1986); *Williams v. Killough*, 474 So.2d 680 (Ala.1985); *Reich v. Holiday Inn*, 454 So.2d 982 (Ala.1984). Furthermore, Alabama does not recognize an independent tort action for bad faith breach of an employment contract. *Hoffman-LaRoche, Inc. v. Campbell*, 512 So.2d 725, 738 (Ala.1987). Accordingly, we affirm that portion of the district court's order granting summary judgment in favor of Sears on the Retirees' claims for breach of their existing employment contracts and breach of the covenant of good faith.[3]

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[3] The Retirees argue that material issues of fact remain which should have prevented the district court from entering summary judgment on their state law claims. We find no material factual disputes as to the breach of contract or bad faith claims which would require resolution at trial; therefore, we see no merit to the Retirees' argument as to those claims.

[9] The district court also granted summary judgment in favor of Sears on the Retirees' claims for misrepresentation, suppression of material facts, and fraudulent inducement to terminate their employment ("the fraud claims"), relying on *Salter v. Alfa Ins. Co.*, 561 So.2d 1050 (Ala.1990). In *Salter,* the court upheld the termination of an at will employee and rejected the employee's fraud claim, holding that even if the elements of actionable fraud based on a misrepresentation to the plaintiff were proven, the fraud claim must fail because the plaintiff suffered no damages as a consequence of her at will status. We find, however, that the employment at will doctrine does not control the Retirees' fraud claims; therefore, *Salter* is not dispositive of these claims.

Certainly the Retirees were at will employees before their retirement. Had Sears fired them, they would have had no cause of action for either breach of contract or fraud as a result of the termination of the employment relationship. In this case, however, Sears made a new arrangement with the Retirees prior to their termination in which Sears agreed to provide enhanced severance benefits in return for the Retirees' agreement to execute releases and waivers. It is this supplemental contract, offered by Sears and accepted by the Retirees, that the Retirees say they were fraudulently induced to enter and about which they claim misrepresentations were made and facts suppressed.[4] The Retirees employment at will status that existed prior to this supplemental contract is only relevant to explain why the new arrangement was offered and accepted.

The Retirees rely on *Smith v. Reynolds Metals Co.*, 497 So.2d 93 (Ala.1986) in support of their argument that they should be allowed to maintain their fraud claims. In *Reynolds,* the court upheld the entry of summary judgment for Reynolds on the plaintiff's breach of contract

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[4] The Retirees also allege that Sears breached this supplemental contract by "not providing [the Retirees] time to consider acceptance of the contract or consult with an attorney regarding the effect of accepting the contract." (Retirees' complaint ¶ 36.) Even accepting these allegations as true, we do not find them sufficient to make out a claim for breach of the supplemental contract. Sears performed fully its obligations within the four corners of the supplemental contract. It delivered all promised consideration. The Retirees' allegations relate specifically to the elements surrounding the contract's formation, not its breach. Thus, the district court correctly granted summary judgment in favor of Sears on the Retirees' claim for breach of the supplemental contract.

claim on the basis of the employee at will doctrine, but reversed the entry of summary judgment on the plaintiff's misrepresentation claim. The claim alleged misrepresentations were made to the plaintiff about her employment status, i.e., that she was not hired as an employee at will, but one employed for the specified term of a summer. The court held that this claim was not an attempt to get around the bar of suit on the basis of termination of employment status, but rather, was a claim that the plaintiff was fraudulently misled into believing that she would not be an employee at will. This is a collateral matter, like the new contract for severance in the present case. We agree with the court's analysis in *Reynolds*, and find that it is controlling in the instant case. We therefore reverse that portion of the district court's order granting summary judgment in favor of Sears on the Retirees' fraud claims.

IV. CONCLUSION

We affirm the district court's order in Case No. 91-7358. We affirm the district court's order in part in Case No. 91-7479 relative to the breach of contract and breach of the covenant of good faith claims, but reverse that portion of the order granting summary judgment as to the Retirees' fraud claims and remand the case for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

COX, Circuit Judge, dissenting:

The majority concludes that this court has jurisdiction over Sears's appeal from the district court's order denying summary judgment based upon the collateral order doctrine. Because I believe that the collateral order doctrine is not applicable, I respectfully dissent.

Ordinarily, interlocutory orders are not appealable. *See* 28 U.S.C. § 1291. The Supreme Court recognized a narrow exception to this rule in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Cohen* established the collateral order doctrine, which provides that an interlocutory order may be appealed if it conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment. *See, e.g., Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985).

Sears argues that the Plaintiffs executed valid releases of all claims in exchange for generous severance benefits. Based upon these releases, Sears asserted a right not to be sued by the Plaintiffs and moved for summary judgment. The district court denied summary judgment. The majority holds that this court has jurisdiction to review the district court's order denying Sears's motion for summary judgment because the order 1) conclusively determined Sears's right to avoid litigation based upon the releases, 2) resolved an important question separate and distinct from the merits of the ADEA claims, and 3) is effectively unreviewable on appeal from final judgment because the litigation will already have taken place. *See supra* at 1039.

The majority's conclusion is supported by two decisions from other circuits. *See Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir.1991) (exercising jurisdiction based on the collateral order doctrine under circumstances almost identical to the case at bar); *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir.1989) (applying the collateral order doctrine to review district court's refusal to enforce settlement agreement which plaintiff allegedly breached by maintaining his lawsuit). While these cases are on point, their holdings violate the Supreme Court's mandate that the collateral order doctrine be construed narrowly.

I find two recent Supreme Court decisions to be instructive. In *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989), the Court held that a criminal defendant was not entitled to an interlocutory appeal from the district court's order denying a motion to dismiss a grand jury indictment on the ground that the prosecution had engaged in illegal public disclosure. It rejected the defendant's claim (which was similar to the claim in this case) that it had a right not to be tried and thereby satisfied the three requirements of the *Cohen* collateral order doctrine. "A right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit *statutory or constitutional* guarantee that the trial will not occur—as in the Double Jeopardy Clause . . . or the Speech or Debate Clause. . . . " *Id.* at 801, 109 S.Ct. at 1499 (citations omitted) (emphasis added).

In *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 109 S.Ct. 1976, 104 L.Ed.2d 548 (1989), a civil case, the Supreme Court affirmed the Second Circuit's refusal to hear an interlocutory appeal from the

district court's order denying a motion to dismiss based upon a forum selection clause. The Court notes that the defendant had bargained for and received the right not to be sued except in Italy. Nevertheless, the Court held that:

> Petitioner's claim that it may be sued only in Naples, while not perfectly secured by appeal after final judgment, is adequately vindicable at that stage—surely as effectively vindicable as a claim that the trial court lacked personal jurisdiction over the defendant—and hence does not fall within the third prong of the collateral order doctrine.

Id. at 501, 109 S.Ct. at 1979.

Justice Scalia's concurring opinion in *Lauro Lines* is particularly instructive.

> While it is true . . . that the "right not to be sued elsewhere than in Naples" is not fully vindicated—indeed, to be utterly frank, is positively destroyed—by permitting the trial to occur and reversing its outcome, that is vindication enough because the right is not sufficiently important to overcome the policies militating against interlocutory appeals. We have made that judgment when the right not to be tried in a particular court has been created through jurisdictional limitations established by Congress or international treaty. . . . The same judgment applies—if anything, *a fortiori*—when the right has been created by private agreement.

Id. at 502-3, 109 S.Ct. at 1980.

I conclude that Sears's asserted right not to be sued based upon private agreements—the releases entered into by the Plaintiffs—is not sufficiently important to justify an interlocutory appeal.

The policies underlying the general rule that interlocutory orders are not appealable are important. The majority's approach creates yet another category of cases where interlocutory appeals are permitted. I would not create an exception for cases like this one.

I would hold that this court does not have jurisdiction over Sears's appeal.

APPENDIX B

FILED
91 FEB-7 PM 12:43
U.S. DISTRICT COURT
N.D. OF ALABAMA
ENTERED
FEB 07 1991

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VERNAL FORBUS; EARL J. BEACHAM; RUDOLPH CADDELL; FRANK R. DAVIS; VERNIE RHODES, JR.,

Plaintiffs,

v.

SEARS, ROEBUCK AND CO.,

Defendant.

CIVIL ACTION
NO. 90-G-1299-S

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause comes before the court on defendant's motion for summary judgment, defendant claiming the plaintiffs have each executed written releases barring any and all legal claims against Sears, and that plaintiffs have not tendered or even offered to tender the consideration which they received in return for executing the releases. Having considered the motion, the pleadings, the submissions of counsel, and the applicable law, the court is of the opinion genuine issues of material fact exist and, therefore, summary judgment is due to be denied. *See Taylor v. Dorough*, 547 So. 2d 536 (Ala. 1989) (In applying equitable circumstances to the law the court ruled that a tender was not a condition precedent to maintaining the action). Furthermore, plaintiffs have offered to do equity. This offer is tender enough. *Lacey v. Edmunds Motor Company*, 113 So. 2d 507 (Ala. 1959). Accordingly, it is

ORDERED, ADJUDGED and DECREED that defendant's motion for summary judgment be and it hereby is DENIED.

DONE AND ORDERED this 7th day of February 1991.

/s/ J. FOY GUIN, JR.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

APPENDIX C

FILED
91 APR 26 PM 1:03
U.S. DISTRICT COURT
N.D. OF ALABAMA
ENTERED
APR 26 1991

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VERNAL FORBUS; EARL J. BEACHAM; RUDOLPH CADDELL; FRANK R. DAVIS; VERNIE RHODES, JR.,

Plaintiffs,

v.

SEARS, ROEBUCK AND CO.,

Defendant.

CIVIL ACTION
NO. 90-G-1299-S

ORDER

This cause comes before the court on the April 11, 1991, motion of defendant for reconsideration of the court's February 7, 1991, order denying summary judgment based on new authority. Having considered the motion, the pleadings, and the applicable law, the court is of the opinion that genuine issues of fact exist and the February 7, 1991, order should not be changed. Accordingly, it is

ORDERED, ADJUDGED and DECREED that the motion to reconsider the February 7, 1991, order of this court denying summary judgment be and it hereby is DENIED.

DONE AND ORDERED this 26th day of April 1991.

/s/ J. FOY GUIN, JR.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

APPENDIX D

FILED
91 MAY 31 AM 11:35
U.S. DISTRICT COURT
N.D. OF ALABAMA
ENTERED
MAY 31 1991

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

VERNAL FORBUS; EARL J. BEACHAM; RUDOLPH CADDELL; FRANK R. DAVIS; VERNIE RHODES, JR.,

Plaintiffs,

v.

SEARS, ROEBUCK AND CO.,

Defendant.

CIVIL ACTION
NO. 90-G-1299-S

MEMORANDUM OPINION

By order and opinion of this date the court grants partial summary judgment to the defendant on counts two through six, common law contract and tort claims, set forth below:

1) count two—fraudulent inducement to enter into releases resulting in the termination of plaintiffs' employment;

2) count three—fraudulent and bad faith breach of the respective plaintiffs' employment contracts;

3) count four—fraudulent inducement to terminate employment;

4) count five—fraudulent suppression of material facts relating to termination of employment; and

5) count six—deceit in connection with termination of employment.

The remaining count, count one, is brought pursuant to the Age Discrimination in Employment Act, as amended, 29 U.S.C.A. § 621 *et seq.* Subject matter jurisdiction is premised upon 28 U.S.C.A. §§ 13331, 1337 and 1343.

Suit is brought by five former full-time employees of Sears, Roebuck and Co. [hereinafter Sears] arising out of the termination of their employment in late 1989 in connection with plans for downsizing the Sears Retail Distribution Center [hereinafter RDC] located in Birmingham, Alabama. Plaintiffs, all over forty years of age, were employed at the RDC in the following capacities: Vernie Rhodes, shipper; Rudolph Caddell, shuttle driver; Frank R. Davis, warehouseman; Earl J. Beacham, truck driver; and Vernal Forbus, shipping manager. When hired each had signed an employment application which reads in pertinent part, as follows:

> In consideration of my employment, I agree to conform to the rules and regulations of Sears, Roebuck and Co., and **my employment and compensation can be terminated, with or without cause and with or without notice, at any time, at the option of either the Company or myself.** I understand that no store manager or representative of Sears, Roebuck and Co., other than the president or vice-president of the Company, has any authority to enter into any agreement for employment for any specified period of time, or to make any agreement contrary to the foregoing. (Emphasis added).

In an effort to compete and recapture its former share of the retail market Sears began a restructuring program in 1987 to reduce its distribution costs. In April 1989 a nationwide reorganization of its merchandise receipt and delivery services was planned. As part of this plan the Birmingham RDC was slated for conversion to a Home Delivery Center [hereinafter HDC].[1] This conversion mandated a substantial work force reduction. Mr. Neal Owings, the Birmingham RDC manager, along with other managers throughout the country,

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[1] The sole function of the Birmingham facility would be to deliver goods directly to customers' homes.

was authorized to and did offer all employees and supervisors the standard Sears reorganization package [hereinafter RI Package] to encourage voluntary severance. Benefits accompanying acceptance of the RI Package listed in the package booklet included severance pay, early retirement, and extended medical and life insurance coverage. The package acceptance deadline was November 6, 1989.

Seventeen employees, including the five plaintiffs, elected to accept the RI Package, making it unnecessary to terminate any employees involuntarily.[2] Plaintiffs Forbus and Caddell accepted the early retirement package and resigned effective November 10, 1989. Plaintiffs Davis, Rhodes and Beacham, ineligible for retirement, accepted the severance package. Davis resigned on November 10, 1989. Rhodes and Beacham resigned prior to November 7, 1989.

Six weeks after the RI Package was offered, Sears headquarters began to reconsider its restructuring plans. Discovering that the Memphis facility was unable to service the Birmingham market, the corporate staff suggested that the Birmingham RDC be converted to a Cross Dock Center as well as a Home Delivery Center.[3] This revision would cut the staff reductions originally anticipated.

Final approval of the revision was received on or about January 2, 1990. Mr. Owings announced the decision in Birmingham on January 16, 1990. Soon thereafter plaintiffs Caddell, Forbus, and Davis telephoned Owings requesting their jobs back.[4] Owings informed them there were no openings at that time. When it became apparent in April that another shipper was needed Sears offered Rhodes unconditional reinstatement to his old position. Unconditional reinstatement was offered to Thomas White at the same time.

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[2] All employees except the home delivery employees were subject to termination had these seventeen not elected voluntary severance. Those not accepting the RI Package gambled that they would not be terminated. Plaintiffs protected their interests by accepting the severance program. Had they been terminated they would not have received the benefits connected with the RI Package.

[3] Prior to the restructuring announcement the Birmingham RDC performed three distinct delivery functions: (1) warehouse for goods; (2) cross-dock center for merchandise in transit; (3) distribution center for Sears retail stores and customers' homes.

[4] No employees were permitted to rescind their release agreements.

Mr. White accepted the offer and is a current employee. Mr. Rhodes refused reinstatement.

Additional positions for part-time employment became available in May when the Birmingham facility began servicing stores previously serviced by the Pensacola, Florida facility. All employees who had accepted the RI Package in November 1989, including the plaintiffs, were offered reinstatement to part-time positions at their old full-time hourly rate. Only Davis accepted the offer as a part-time shipper.

This court is of the opinion that breach of contract claims should be dismissed. Plaintiffs had no employment contracts. They were, as evidenced by their employment applications, at-will employees who could be discharged at any time for any reason.[5] Courts have consistently upheld the at-will provision of the Sears employment application.

In *Reid v. Sears, Roebuck and Co.*, 790 F.2d 453 (6th Cir. 1986), the court said:

> Every reported district court case involving a claim of unlawful discharge in the face of the language contained in the Sears application has resulted in summary judgment for Sears. *Novosel v. Sears, Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980); *Summers v. Sears, Roebuck & Co.*, 549 F. Supp. 1157 (E.D. Mich. 1982); *Ringwelski v. Sears, Roebuck & Co.*, ____ F. Supp. ____ (E.D. Mich. Sept. 6, 1985). Further, the Michigan Court of Appeals affirmed summary judgment for Sears in *Eliel v. Sears, Roebuck & Co.*, 387 N.W.2d 842 (Mich. App. 1985). The court found that Eliel's employment was governed by the terms of the application and that none of the subsequent statements by Sears representatives relied on by the plaintiff was made by the president or vice president of the company. The Michigan Court of Appeals reached the same conclusion in a case against another employer whose agreement with its employees required an acknowledgment that "my employment and compensation can be terminated, with or without notice at

[5] The court rejects the plaintiffs' argument that the RI Package was a novation which changed their at-will status.

> any time at the option of either the Company or myself . . . " *Ledl v. Quik Pik Stores*, 133 Mich. Appl. 583, 349 N.W.2d 529 (1984).

790 F.2d at 461.

Federal interpretation of the language of the Sears employment application is consistent with Alabama law. Plaintiffs were hired for an indefinite period of time and could leave or be discharged at any time for any reason. *See Goodwin v. Barry Miller Chevrolet, Inc.*, 543 So. 2d 1171 (Ala. 1989) (Summary judgment was properly entered on the contract claim because the employee was at most an employee at will); *Hickenbottom v. Preferred Risk Mutual Ins.*, 514 So.2d 881 (Ala. 1987) ("Contracts without a fixed term are terminable at the will of either party and may be terminated for any cause or for no cause.") (quoting *Bates v. Jim Walter Resources, Inc.*, 418 So. 2d 903 (Ala. 1982)).

The Alabama Supreme Court upheld language similar to that in the Sears employment application in *Shelby v. Zayre Corp.*, 474 So. 2d 1069 (Ala. 1985). The court granted summary judgment for the department store because "Shelby signed an employment application which specifically stated that employment could be terminated 'with or without cause, and with or without notice, at any time, at the option of either the company or [the employee].'" 474 So. 2d at 1071.

In upholding termination of at-will employees the Alabama Supreme Court has said:

> The general rule is that an employment contract at will may be terminated by either party with or without cause or justification. 56 C.J.S. *Master and Servant* § 31; and 62 A.L.R. 3d 271. This means a good reason, a wrong reason, or no reason.
>
> Alabama has followed the general rule which is that in a contract of employment "at will," the contract means what it says, that it is at the will of either party. The employee can quit at will; the employer can terminate at will. *Alabama Mills, Inc. v. Smith*, 237 Ala. 296, 186 So. 699 (1939). This is true whether the discharge by the employer was malicious or done for other improper reasons. *Commercial v. International Harvester Co.*, 235

> Ala. 376, 178 So. 894 (1938). This has been the Alabama law since the early years of this century.

Hinrichs v. Tranquilaire Hospital, 352 So. 2d 1130, 1131 (Ala. 1977). More recent holdings of the court have followed this reasoning. *See Jones v. Ethridge*, 497 So. 2d 1107 (Ala. 1986) (The passage by the legislature of Code 1975, § 12-16-8.1 and § 25-5-11.1 does not change the "general common law rule with respect to the employer's right to fire an at-will employee.")

Consistent with the law set forth the court holds that plaintiffs were at-will employees. Sears did not breach a contract with any of them. Furthermore, the court holds that the fraud counts be rejected. In *Salter v. Alfa Insurance Company, Inc.*, 561 So. 2d 1050 (Ala. 1990), the court upheld the termination of an at-will employee and rejected the employee's fraud claim. The court held that even if the elements of actionable fraud based on a misrepresentation were present, the fraud claim would fail. The plaintiff suffered no damages. Specifically, the court said:

> Salter had an employment contract which was terminable by Alfa at any time and for any, or no, reason. Even assuming that Salter proved that Alfa, through one of its representatives, had intentionally or recklessly misrepresented to her that she did not have to participate at all in the investigation of the W.B. claim; that she had acted upon that misrepresentation; and that Alfa had based the termination of her contract on her failure to cooperate in the investigation, the fraud claim would still fail. Although we could never sanction the kind of treatment that Salter is alleged to have received from Alfa in this case, Alfa had the right under the employee-at-will doctrine to terminate Salter's contract, even if it did so maliciously or for some other improper reason.

Id. at 1054.

Salter is almost directly on point. As in *Salter*, plaintiffs here are at-will employees. The court is not saying whether or not Sears misrepresented its reorganization plans. While plaintiffs contend Sears knew that it was not going to cut back on its employees at the time the RI Package was presented, there is no evidence to that effect. All the

evidence indicates the change in plans occurred after plaintiffs had accepted the offer. Predictions about the future are not fraudulent if they turn out wrong, unless they were made with a present intent to deceive. *See Lankford v. Witmoudt*, 528 So. 2d 850, 853 (Ala. 1988) (Fraud claim could not be sustained because there was no evidence defendant had a present intent to deceive, or that he had no intention of carrying out his promises); *Selby v. Quartrol Corp.*, 514 So. 2d 1294, 1297 (Ala. 1987) (When alleged misrepresentations concern **future acts** the plaintiff must prove "(1) that the defendant intended, **at the time of the alleged misrepresentation, not to perform,** and (2) that the defendant made the representation with a **present intent to deceive."**).

While it is true the defendant offered inducements to encourage voluntary terminations, these inducements to resign did not give plaintiffs greater rights than they would have had had they been fired. They suffered no recoverable damages. Without damages the claims of fraud and deceit fail.[6]

Since plaintiffs have suffered no recoverable damages the fraud and deceit claims in counts two through six fail. In order to recover plaintiffs must show they were injured. *Lowe v. American Medical International,* 494 So. 2d 413, 415 (Ala. 1986); *Williams v. Prudential Ins. Co.*, 470 So. 2d 1200, 1202 (Ala. 1985); *National States Insurance Co. v. Jones,* 393 So. 2d 1361, 1363-64 (Ala. 1980); *Old Southern Life Insurance Co. v. Woodall,* 295 Ala. 235, 239-40, 326 So. 2d 726, 729 (1976).

Plaintiffs claim for breach of an implied covenant of good faith and fair dealing should be dismissed as a matter of law. Alabama courts do not recognize an independent tort action for "bad faith" breach of employment contract. *Hoffman-LaRoche, Inc. v. Campbell,* 512 So. 2d 725, 738 (Ala. 1987) (Obligation of "good faith" arises as part of the contract; its breach does not give rise to an action in tort.);

---

[6] Nor did the inducements to resign form a basis for the claim of mental anguish or distress as claimed in the deceit count. *Slovensky v. Birmingham News Company, Inc.*, 358 So. 2d 474, 477 (Ala. Civ. App. 1978) (Court refused to allow wife damages for mental distress for the alleged wrongful discharge of her husband noting that no recovery had ever been allowed for mental distress arising from the wrongful discharge of an employee in breach of an employment contract).

Harrell v. Reynolds Metals Co., 495 So. 2d 1381, 1388 (Ala. 1986) (Court refused to extend to the area of general contract law the tort of bad faith); *Kennedy Elec. Co. v. Moore-Handley, Inc.* 437 So. 2d 76, 81 (Ala. 1983) (Court refused to extend the tort of bad faith beyond the area of insurance policy cases); *Brown-Marx Associates, Ltd. v. Emigrant Savings Bank*, 527 F. Supp. 277 (N.D. Ala. 1981), *aff'd*, 3 F.2d 1361 (11th Cir. 1983) (The bad faith tort action has not been applied to actions other than insurance contracts).

Although the implied covenant of good faith and fair dealing attaches to every contact it does not alter contract terms. *Hilley v. Allstate Insurance Company*, 562 So. 2d 184, 190 (Ala. 1990) (Court refused to allow the obligation of good faith and fair dealing to supply a term that added something new or different to the rights and obligations to which the parties have expressly agreed or to vary clear contract terms). Similarly, this court cannot allow the obligations of good faith and fair dealing to alter or vary the terms of the at-will contracts before it. The individual contracts between Sears and the plaintiffs do not violate public policy; hence, there is no reason for the court to interfere.

For the above stated reasons the court grants the motion of the defendant for partial summary judgment. An order consistent with this opinion is being entered contemporaneously herewith.

DONE this 31st day of May 1991.

/s/ J. FOY GUIN, JR.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

APPENDIX E

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 10 1992
MIGUEL J. CORTEZ
CLERK

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, VERNIE RHODES, JR., *Plaintiffs-Appellees.* v. SEARS, ROEBUCK AND CO., *Defendant-Appellant.*	NO. 91-7358
VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, VERNIE RHODES, JR., *Plaintiffs-Appellees.* v. SEARS, ROEBUCK AND CO., *Defendant-Appellant.*	NO. 91-7479

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ORDER:

☐ The motion of *Appellant,* for ☒ stay ☐ recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

☒ The motion of *Appellant,* for ☒ stay ☐ recall and stay of the mandate pending petition for writ of certiorari is GRANTED to and

including *Sept. 12, 1992,* the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of for a further stay of the issuance of the mandate is GRANTED to and including under the same conditions as set forth in the preceding paragraph.

☐ IT IS ORDERED that the motion of , for a further stay of the issuance of the mandate is DENIED.

/s/ JOEL F. DUBINA

UNITED STATES CIRCUIT JUDGE

APPENDIX F

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 22 1992
MIGUEL J. CORTEZ
CLERK

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, VERNIE RHODES, JR.,
Plaintiffs-Appellees.

v.

SEARS, ROEBUCK AND CO.,
Defendant-Appellant.

NO. 91-7358
NO. 91-7479

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion April 20, 1992, 11th Cir., 19 , F.2d).

Before: COX and DUBINA, Circuit Judges and GODBOLD, Senior Circuit Judge.

PER CURIAM:

☒ The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule

35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

☐ The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having noted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ JOEL F. DUBINA

UNITED STATES CIRCUIT JUDGE

APPENDIX G

The relevant provisions of the Age Discrimination in Employment Act, as amended, 29 U.S.C. §621 *et seq.*, are set forth below:

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that—

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 626. Recordkeeping, investigation, and enforcement

* * *

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as

provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F) (i) the individual is given a period of least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

OCT 13 1992
OFFICE OF THE CLERK

No. 92-446

IN THE

Supreme Court Of The United States

October Term, 1992

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, AND VERNIE RHODES, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether employees who have executed a release and waiver based on the employer's misrepresentations and fraud must unconditionally tender back the consideration before commencing an ADEA suit against the employer.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below are reflected in the case caption. Respondents Vernal Forbus, Earl J. Beacham, Rudolph Caddell, Frank R. Davis, and Vernie Rhodes, Jr., are listed individually.

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No. 92-446

IN THE

Supreme Court Of The United States

October Term, 1992

SEARS, ROEBUCK AND CO.,

Petitioner,

v.

VERNAL FORBUS, EARL J. BEACHAM, RUDOLPH CADDELL, FRANK R. DAVIS, AND VERNIE RHODES, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Respondents, Vernal Forbus, Earl J. Beacham, Rudolph Caddell, Frank R. Davis, and Vernie Rhodes, Jr., respectfully pray that this Court will enter an order denying the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed by the Petitioner, Sears, Roebuck and Co. ("Sears").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 958 F.2d 1036. (Petitioner's App. A, pp. A3-A16). The relevant District Court's orders are those contained in Petitioner's App. B, pp. A17-A18 and App. C, pp. A19-A20. The District Court's Memorandum Opinion contained in Petitioner's App. D, pp. A21-A28 is not relevant to the matters sought to be reviewed by this Petition. (See Petition for Writ of Certiorari, p. 3, fn. 2).

JURISDICTION

The Respondents' concur in the Petitioner's Statement of Jurisdiction insofar as the Petition is timely in that review is sought pursuant to 28 U.S.C. § 1254(1).[1]

STATUTE INVOLVED

In addition to those provisions of the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA") set forth in Petitioner's Appendix at App. G, pp. A33-A35, the Respondent sets forth an additional relevant provision of the ADEA, as follows:

---

[1] In the Court below, Sears' appeal was from an interlocutory order which was neither final pursuant to 28 U.S.C. § 1291 nor certified for appeal under 28 U.S.C. § 1292(b). Sears contended that appellate jurisdiction was appropriate under the Collateral Order Doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The Eleventh Circuit held the Collateral Order Doctrine applicable (Petitioner's App. A, pp. A8-A9) with one member of the panel, Judge Cox, dissenting (Petitioner's App., pp. A14-A16). Respondents were not aggrieved by the Eleventh Circuit's application of the Collateral Order Doctrine nor do the Respondents seek review of that portion of the Eleventh Circuit's Opinion. Nevertheless, Respondents are mindful that the parties cannot confer subject matter jurisdiction on the Court.

§ 623. Prohibition of age discrimination

(a) Employer practice

It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

STATEMENT OF THE CASE

The Respondents will restrict this Statement of the Case solely to those aspects of Petitioner's Statement of the Case to which Respondents take issue. Sears recites certain facts, particularly those involving the circumstances surrounding the Respondents' signing the releases and waivers, as if they were not subject to dispute.[2] The circumstances surrounding the Respondents' signing of the releases and waivers, as alleged by the Respondents in their complaint, form one of the factual basis for the Respondents' ADEA claims.[3]

---

[2] Petitioner cites to the district court's Memorandum Opinion in support of factual statements in its Statement of the Case. Those citations are irrelevant and inappropriate as the writ before this Court is from the Eleventh Circuit Court of Appeals.

[3] Not surprisingly, the Petitioner has disputed the factual allegations made by the Respondents throughout these proceedings. The Petitioner recognized, as did the district court, that factual disputes cannot be resolved on summary judgment. Consequently, Sears contended before the district court and on appeal that, even assuming the releases and waivers were induced by

In October of 1989, the Respondents were told that Sears' Retail Distribution Center ("RDC") at the Omega Street facility in Birmingham, Alabama would be closed effective December 31, 1989. The Respondents were told that the RDC facility would be converted to a Home Delivery Center ("HDC"). Petitioner's App. A., p. A6. The RDC facility included, among other things, home delivery, warehousing, and customer service functions at the Omega Street facility. Respondents were told that the effect of converting the RDC to an HDC would be to retain the home delivery function of the RDC and eliminate all other jobs at the Omega Street facility. The Respondents' jobs were part of the warehousing function of the RDC. The Respondents were told that their jobs would be eliminated effective December 31, 1989, and if they did not accept the severance package being offered, which required executing the releases and waivers, they would be permanently laid off effective December 31, 1989 with no severance benefits. The Respondents were told they had no choice. The Respondents were told it would do no good to have a lawyer review the terms of the severance package or the releases or waivers because the decision had already been made.

In fact, the Respondents' jobs were not eliminated but were filled by employees who were either younger or had less seniority. In fact, Sears permitted some employees to revoke their acceptance of the severance program and repudiate their previously signed releases and waivers. Respondents were denied reinstatement and the opportunity to revoke their releases and waivers, although other employees were permitted to do so. The timing of Sears' decision to "restructure" the Omega Street operation into a combined HDC and Cross-Dock Center (thus preserving the jobs in the warehouse for all employees except the Respondents) is likewise an issue in this case which is subject to dispute.

---

fraud, duress, or otherwise involuntary, the retention of severance pay absolutely bars the Respondents from maintaining their ADEA action.

These factual matters are in dispute and undoubtedly, the Petitioner will not agree with Respondents' statement of the case. However, the Respondents set forth these disputed facts to demonstrate the inaccuracy of Petitioner's characterization of the events which culminated in Respondents' signing releases and waivers. Petitioner's characterization that "Respondents voluntarily accepted the severance package" is entirely inappropriate and inaccurate.

Finally, the Petitioner states that the Respondents' lawsuit "asserts that the releases were defective, however, because they were allegedly based upon misrepresentations as to what would be the fate of the Birmingham facility." Respondents' lawsuit does make this assertion. However, Respondents' complaint also asserts allegations of numerous other misrepresentations, which include, among others, the terms of the severance package itself; the legal effect of accepting the severance program being conditioned upon signing the releases and waivers; and whether the Respondents' acceptance was voluntary.

REASONS FOR DENYING THE WRIT

Review by this Court of the decision below is neither necessary nor warranted. *First,* the issue of whether an employer should be permitted to coerce older workers protected by the ADEA to voluntarily retire through fraud and duress is not the question before the Court. The ADEA obviously does not allow this. *Second,* the ability to disavow scrutiny under the ADEA based upon a *voluntary* release and waiver when the employees did not "tender back" the consideration is not one of national importance, nor is it the question before the Court. For purposes of appeal, the Petition states that even employees who have executed *involuntary* releases and waivers obtained by fraud should "tender back" consideration. *Third,* the Eleventh Circuit's opinion does not conflict either directly or "in principle" with the other circuits because those circuits did not consider *Hogue. Finally,* the Eleventh Circuit's

decision is clearly consistent with the overall scheme and purpose of the ADEA which is to protect older workers from being forced or coerced to retire involuntarily. The Eleventh Circuit's reliance upon *Hogue v. Southern Railway Co.*, 390 U.S. 516 (1968), neither calls into question the validity of *Hogue* nor represents an unwarranted extension of that holding.

A. THE DECISIONS OF OTHER CIRCUIT COURTS WHICH PETITIONER RELIES UPON DO NOT CREATE A CONFLICT REQUIRING RESOLUTION BY THIS COURT.

Petitioner relies upon *Grillet v. Sears Roebuck & Company*, 927 F.2d 217 (5th Cir. 1991) and *O'Shea v. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 117, 116 L.Ed.2d 139 (1991), for the proposition that the Eleventh Circuit's opinion in this case creates a conflict which requires resolution by this Court. Both of these cases are readily distinguishable from the instant case and neither creates a conflict requiring resolution by this Court. Neither *Grillet* nor *O'Shea* considered *Hogue* and what effect it would have on those cases. In *Grillet*, the Fifth Circuit addressed the "ratification" and "tender back" issue presented there in terms of the "federal common law" of commercial contracts without regard to the principles set forth in *Hogue*. In *O'Shea*, the Fourth Circuit applied the common law of Maryland as regards the application of that state's law governing "ratification" and "tender back."[4]

[4]Neither the Petitioner nor the Respondents differ that the issue of the validity of the releases and waivers and the application of "ratification" and "tender back" principles are questions of federal law, not state law. The district court's denial of the Petitioner's Motion for Summary Judgment was premised upon the common law of Alabama, in response to the legal theory advanced by the Petitioner. The Petitioner contended in its Motion for Summary Judgment that the application of the common law of Alabama on "ratification" and "tender back" required a judgment in Petitioner's favor as a matter of law. The district court, properly, rejected that position.

It was not until *Grillet* was decided, which occurred after Petitioner's Motion for Summary Judgment had been denied, that the Petitioner advanced

Admittedly, the results reached by the Fifth and Fourth Circuits in *Grillet* and *O'Shea*, respectively, were contrary to the result reached by the Eleventh Circuit in the instant case. However, neither *Grillet* nor *O'Shea* considered the effect of *Hogue* nor was there any consideration as to whether the principles enunciated in *Hogue* were applicable to the circumstances presented in those cases. Neither case rejected *Hogue* nor declined to apply the principles enunciated in *Hogue*. Consequently, the Eleventh Circuit's reliance upon *Hogue* in this case does not present a conflict among the circuits requiring resolution of a controlling legal principle by this Court.

Petitioner also references *Janneh v. GAF Corp.*, 887 F.2d 432 (2nd Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 177, 112 L.Ed.2d 141 (1990), and *Cumberland & Ohio Co. v. First American National Bank*, 936 F.2d 846 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 878, 116 L.Ed. 783 (1992), as conflicting "in principle" with the Eleventh Circuit. This reference is wholly specious. In *Janneh*, the plaintiff initiated a lawsuit and subsequently authorized his attorney to accept the defendant's counteroffer of settlement in the amount of $3,000. In *Janneh*, there was no claim that GAF coerced the plaintiff into settling, rather, the plaintiff claimed his own attorney coerced him into settling through "civil pressure." The Second Circuit enforced the term of the agreement and held that this claim of coercion was frivolous. There was no issue of an ADEA release.

In the instant case, the Petitioner coerced[5] Respondents to retire involuntarily and extracted the releases and waivers at a time when Respondents were not represented. Indeed, Re-

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the theory that federal, not state, law controlled using that theory as the basis for Petitioner's Motion for Reconsideration before the district court. On appeal, the Petitioner similarly advanced that the issues presented were matters of federal law.

[5] Whether Sears in fact coerced respondents is a matter of dispute. However, Sears' legal position on Summary Judgment and before the court below assumed the allegations of fraud and coercion to be true.

spondents had no reason to believe their retirements and "voluntary" resignations had been obtained through fraud and misrepresentation until approximately January 16, 1990 when they learned that their jobs had not been eliminated. Respondents took immediate and definitive action to revoke their resignations and repudiate the releases and waivers upon which Petitioner now relies. Respondents immediately requested reinstatement. Respondents filed their EEOC charges within several weeks of learning that their retirements and the required releases and waivers had been obtained through misrepresentations and fraud.

Further, the Sixth Circuit decision cited by Petitioner as "conflicting in principle," *Cumberland & Ohio Co.*, 936 F.2d 846 (6th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 878, 116 L.Ed. 783 (1992), is not an ADEA case and was decided under Tennessee law rather than federal common law.

B. THE DECISION BELOW DOES NOT RAISE ANY IMPORTANT QUESTION OF FEDERAL LAW WHICH REQUIRES RESOLUTION BY THIS COURT.

That the voluntary resolution of disputes, regardless of the nature of the dispute, should be promoted by our legal system as a matter of public policy is not a proposition with which the Respondents take issue. Nor was it the legal issue before the court below or properly presented to this Court. Petitioner's attempt to posit the issue before this Court as to whether application of the "tender back" principles supports or denigrates the policy encouraging voluntary resolution of disputes is a fiction.

The issue ultimately to be decided in the trial of this action is *not* whether the ADEA does, or should, permit an employee, or former employee, to avoid the effects and consequences of a *voluntary* settlement, *voluntary* release and waiver, or *voluntary* retirement. Rather, the real issue in this case is whether the Respondents' retirements were, in fact, voluntary or involuntary and thus violative of the ADEA.

There are, not surprisingly, serious questions of disputed fact requiring a trial to resolve these issues. The Petitioner does not, and cannot, seriously contend otherwise. Thus, for the Petitioner to posit before the Court the proposition that the Eleventh Circuit's decision threatens *voluntary* resolutions of disputes contrary to the overriding public policy of encouraging *voluntary* resolutions of disputes is wholly fictional. The voluntariness of the Respondents' actions in this case is the sum and substance of this case which has yet to be resolved and cannot be resolved without a trial.

The Eleventh Circuit correctly stated the position of the parties in the court below as follows:

> Sears argues that even if the releases were tainted by misrepresentation or duress, the Retirees ratified them as a matter of law by accepting the benefits of the bargain. Sears insists that the Retirees cannot be allowed to retain the severance benefits at the same time they deny Sears the benefit of its bargain by maintaining this lawsuit. The Retirees contend that the tender back of their severance benefits is not an absolute requirement.

Forbus v. Sears, Roebuck & Co., 958 F.2d 1036, 1040 (11th Cir. 1992).

If the Eleventh Circuit's decision presents any policy issue it is whether or not an employer should be permitted under the ADEA to obtain involuntary retirements and releases and waivers induced by fraud, misrepresentations and duress and then to avoid the consequences of such illegal acts by requiring the retirees to tender back the severance pay as a precondition to filing suit. If, in fact, the Eleventh Circuit's decision is construed as a balancing of competing interests, then the balance struck by the Eleventh Circuit is clearly the correct one and consistent with the purposes of the ADEA.

If, employees seeking to disavow ADEA releases is a recurrent question of national importance, as Petitioner suggests, then it is not because of the application or non-application of

the "tender back" rule. Rather, it is because of the circumstances, or alleged circumstances, under which such releases are obtained. The enactment in 1990 of the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f), does, indeed, underscore the importance of *voluntary* settlements and waivers in the ADEA enforcement scheme. But what it underscores is the necessity that the waiver obtained be *voluntary* and not tainted by fraud, duress, or coercion.[6] It is the voluntariness of the Respondents' retirements and executing the releases and waivers which the Respondents seek to have tried, and are entitled to have tried, since there are disputed facts.

The Petitioner seeks to have the tables turned and have this Court adopt a policy which, rather than encouraging voluntary settlements, as are favored in the law, would encourage involuntary releases and involuntary retirements, otherwise violative of the ADEA, and immunize employers from potential ADEA liability if the victims of such illegal conduct do not tender back the severance pay as a precondition to filing suit. The Eleventh Circuit's decision is in no way contrary to, nor does it implicate, any policies favoring the voluntary resolution of disputes. Employers need not be concerned in effectuating so called downsizing policies if those policies are indeed voluntary and meet the requirements of the ADEA, as amended by the OWBPA.

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[6]There can be little doubt that Congress enacted the OWBPA, as an amendment to the ADEA, precisely in response to concerns over employer overreaching and involuntary waivers such as the response alleged occurred in the instant case. Thus, both Congress and the Eleventh Circuit, (albeit in different contexts), have struck a balance disfavoring involuntary releases and waivers obtained by employers through fraud and duress. The OWBPA, amending the ADEA, was enacted on October 16, 1990 approximately one year after the events which gave rise to this action occurred.

C. THE COURT BELOW NEITHER MISCONSTRUED NOR MISAPPLIED A DECISION OF THIS COURT.

The Petitioner complains that the Eleventh Circuit misconstrued and misapplied this Court's reasoning in *Hogue*. The Eleventh Circuit's rationale, reasoning, and holding based upon the application of Hogue is clear, concise, and compelling. It needs no further amplification, explanation, or justification here.

CONCLUSION

For all the foregoing reasons, Sears' Petition for Writ of Certiorari should be denied.

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Petitioner,

v.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY MEMORANDUM

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1. The question presented for review – whether employees who seek to disavow ADEA releases are required, as a precondition to suit, to return the benefits they received in exchange for such releases – does not depend on whether the releases were voluntary or involuntary. (Brief in Opp., p. 8) Nor does it turn on whether the releases were obtained by fraud, misrepresentation or duress. Those are issues that will be decided, as Respondents concede (id., p. 9), only after trial. The question here is whether such a trial should occur when the plaintiffs retain the valuable consideration they received in

exchange for relinquishing the right to go to trial. Once a trial occurs, the defendant has lost the benefits for which it bargained. The plaintiffs, however, continue to retain the benefits of that very same bargain. If plaintiffs wish to sue, after they enter into releases and receive enhanced benefits, that is their right. They can then nullify the release by demonstrating it was procured by fraud, duress or misrepresentation. But they must first tender back the benefits they received for the release. If the employer rejects the tender, suit may proceed on the validity of the releases. If the employer accepts the tender, the parties are restored to the status quo ante. The employees may then sue unimpeded by the releases. The court below did not follow this approach; it permitted the Respondents to have it both ways. Nothing in the ADEA, as *Grillet* and *O'Shea* recognized, compels that incongruous result.

Respondents' *ex post* perspective – *i.e.*, given fraud, an employee should be entitled to disavow a release – misses the point. The real question is whether, *ex ante*, employers will offer enhanced benefits if there is a real likelihood such benefits will later be used, with impunity, to finance an ADEA lawsuit. This policy issue is of national significance.

2. Respondents also err in asserting there is no conflict in the circuits. They concede that "the results reached by the Fifth and Fourth Circuits in *Grillet* and *O'Shea*, respectively, were contrary to the result reached by the Eleventh Circuit in the instant case." (Brief in Opp., p. 7.) Nevertheless, they contend that no true conflict exists because the other circuits never considered this Court's decision in *Hogue v. Southern Railway Co.*, 390 U.S. 516

(1968). (Brief in Opp., p. 7.) Respondents' position is specious. *First,* it is pure speculation whether the Fifth and Fourth Circuits failed to consider *Hogue* or whether, as appears more likely, they simply rejected it as irrelevant in the discrimination law context. *Hogue* is a 24 year old opinion which was equally available to the other circuits which have addressed this issue. This is not an instance where a recent decision of this Court renders moot an apparent conflict between appellate decisions rendered before and after this Court's pronouncement. *Second,* Respondents overstate the impact of *Hogue* upon the decision of the court below. The Eleventh Circuit stated unequivocally as follows:

> We agree with, and find persuasive, the reasoning set forth in *Isaacs* that explains public policy considerations supporting our determination that the Retirees should not be required to tender their retirement benefits back to Sears as a prerequisite to the maintenance of their lawsuit. 765 F.Supp. at 1366-68.

App. A, p. A11. It is thus clear that the Eleventh Circuit disagreed with *Grillet* and *O'Shea* on fundamental policy grounds. This is a quintessential example of a conflict in the circuits which must be resolved.

Respectfully submitted,

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